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No. 02-1080

In The

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,

Petitioner,

v.

DENNIS CLINE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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DENNIS CLINE, ET AL.,

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Court of Appeals for the Sixth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The ERISA Industry Committee ("ERIC") respectfully submits this *amicus curiae* brief in support of the Petitioner General Dynamics Land Systems, Inc. Correspondence reflecting the consent of the parties to the filing of *amicus curiae* briefs has been filed with the Clerk of the Court.[1]

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity other than *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

ERIC is a non-profit organization representing America's largest private employers. ERIC's members provide benefits to millions of active and retired workers and their families through pension, health care, and other employee benefit plans governed by the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code (the "tax code"). All of ERIC's members do business in more than one State, and many have employees in all fifty States. ERIC frequently participates as *amicus* in cases that have the potential to have a substantial impact on employee benefit design or administration.[2]

ERIC's members have a vital interest in this case. Pursuant to federal employee benefit and tax statutes, ERIC's members sponsor, and would like to be able to continue to sponsor, employee pension and welfare plans that provide enhanced benefits to their older workers. Many of these plans condition eligibility on a minimum age older than 40 or otherwise favor older workers who have achieved a certain age beyond 40. For the most part, the use of these over-age-40 milestones is either expressly or implicitly endorsed by ERISA and the tax code. An interpretation of the Age Discrimination in Employment Act ("ADEA") that would prohibit distinctions based on age among all workers over age 40 would negate or effectively re-write

[2] *See, e.g., Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

commonplace benefit plan features that are either required or permitted by ERISA and the tax code.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals erred in concluding that the ADEA permits younger workers in the ADEA's protected class to sue for discrimination on the grounds that older workers in the class received more or better benefits. The decision below is fundamentally at odds with the employee benefit architecture that Congress has constructed to require and encourage employers to provide additional benefits to their older employees. In ERISA and the provisions of the tax code granting favorable tax treatment to certain benefit plans, Congress itself has set certain age milestones that recognize that it is neither necessary nor appropriate to treat all workers age 40 and over as if their benefit needs were the same. Under these provisions, for example, once they reach ages 50, 55, 59½, 65, and 70½, plan participants either must receive or are permitted to receive certain benefits that are not available to younger participants.

It is inconceivable that Congress intended the ADEA to prohibit the type of practices that Congress itself has repeatedly and expressly endorsed. Nor is there any indication in the text or history of the ADEA that Congress intended to reserve to itself the prerogative to make age-based distinctions that provide more favorable benefits to older workers. Rather, the text and structure of the ADEA reflect the presumption that employers can and should provide benefits to older workers that are not available to their younger counterparts.

Many employers have benefit plans that provide retirees and older employees with benefits that are not made available on the same terms to all those age 40 and over. Principal among these are retiree health and life insurance plans, which are commonly open only to workers who have achieved some age milestone beyond age 40. Affirmance of the decision below would threaten these common benefit programs and frustrate the basic goals of the ADEA. For these reasons, ERIC respectfully submits this brief urging the Court to reverse the decision below.

ARGUMENT

I. FEDERAL LAWS GOVERNING EMPLOYEE BENEFITS MAKE THE KIND OF AGE-BASED DISTINCTIONS THAT WOULD BE UNALLOWABLE IF THE ADEA PROHIBITED "REVERSE" DISCRIMINATION.

The conclusion that, in enacting the ADEA, Congress intended to prohibit employers from making any age-based distinction over age 40 in the administration of their benefit plans is fundamentally at odds with the congressional judgments reflected in the statutes governing employee benefit plan design. Under the Sixth Circuit's novel interpretation of the ADEA, employers could be subject to liability for any employee benefit program that provides enhanced benefits to older workers unless the same benefits are available to all those age 40 and over. At the same time, ERISA and the tax code contain numerous provisions that either require or permit an employer to take into account the special situation of older employees. The decision below

therefore erroneously reads the ADEA in a manner entirely incompatible with the statutory regime of employee benefit regulation that Congress has constructed.

Under ERISA and the tax code, a typical worker is entitled to certain pension and welfare benefits once he reaches a certain age. These benefits begin not at age 40 when the employee enters the ADEA protected class, *see* 29 U.S.C. § 631, but when he reaches older, statutorily prescribed age thresholds such as 55, 59½, 65, and 70½.

At age 55, an employee must be allowed to diversify his account under the employer's Employee Stock Ownership Plan ("ESOP"). An ESOP is a defined contribution pension plan that invests contributions primarily in the stock of the employer. *See* 26 U.S.C. § 4975(e)(7)(A); *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995). However, the tax code requires that an ESOP participant be allowed to diversify up to 25% of his ESOP account after attaining age 55 and completing ten years of participation in the plan. *See* 26 U.S.C. § 401(a)(28). Under this provision, therefore, employers must grant workers age 55 and up — but not their counterparts age 40 to 54 years old — the right to expanded investment opportunities.

At age 59½, a worker may receive distributions from his retirement savings without financial penalty. To encourage workers to save funds for retirement, the tax code generally imposes an additional 10% tax on early distributions from qualified retirement plans. *See* 26 U.S.C. § 72(t). Once the worker reaches age 59½, however, this 10% tax is waived. *See* 26 U.S.C. § 72(t)(2)(A)(i). A waiver also applies to employees who terminate employment at age 55 or older. *See* 26 U.S.C. § 72(t)(2)(A)(v). In other words,

the tax code removes impediments to the receipt of distributions when the employee reaches age 59½, if the employee is still working, or age 55, if he has terminated employment.

At age 65, an employee who has terminated employment must be allowed to begin receiving his vested benefits under his employer's retirement plan. As a general rule, employee pension plans are not required to allow participants to begin receiving benefits immediately after terminating employment. Traditional defined benefit plans require the employee to attain an age defined as the "normal retirement age" under the plan before receiving retirement benefits. Nevertheless, ERISA and the tax code provide an exception to this general rule for workers age 65. Irrespective of the age that the plan designates as the "normal retirement age," ERISA and the tax code require an employer to allow a participant to begin receiving benefits at age 65 if he has terminated employment and began participation in the plan at least ten years earlier. *See* 29 U.S.C. § 1056(a); 26 U.S.C. § 401(a)(14). In conjunction with rules requiring full vesting of benefits under a pension plan at age 65,[3] the effect of this provision is to guarantee that the vast majority of employees can retire at age 65 with an immediate pension income. *See* H.R. Rep. 93-807, at 70 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4735 (rule intended to "ensure that a participant can reasonably expect to receive his retirement benefits during his retirement

[3] *See* 29 U.S.C. § 1053(a) (benefits must be fully vested upon attainment of "normal retirement age"); 29 U.S.C. § 1002(24) (normal retirement age may not be later than the later of age 65 or the completion of five years of participation in the plan); 26 U.S.C. § 411(a) (same).

years"). Only workers age 65 and up — and not their counterparts aged 40 to 64 — are entitled to this benefit.

At age 70½, a pension plan participant who continues to work for the employer must begin receiving an upward adjustment to his pension benefits. Under the law in effect before 1996, a participant in a pension plan had to begin receiving his benefits the year after he reached age 70½, even if he continued to work for the same employer. *See* 26 U.S.C. § 401(a)(9), *amended by* Pub. L. No. 104-188 § 1404(a), 110 Stat. 1755 (1996). In 1996, Congress amended Section 401(a)(9) of the tax code to provide that the commencement of distributions could be delayed beyond age 70½ as long as the participant continued to work for the same employer. *See* Pub. L. No. 104-188 § 1404(a). Congress nevertheless mandated that defined benefit plans provide an upward actuarial adjustment to the participant's benefit to take into account the period after age 70½ in which the employee does not receive retirement benefits. *See* 26 U.S.C. § 401(a)(9)(C)(iii). Under this provision of the tax code, only employees who reach 70½ are entitled to an upward adjustment.[4]

In addition to requiring employers to provide certain rights to employees who reach milestone ages over 40, the

[4] Similarly, if payment of a participant's pension benefit is suspended after the participant has reached normal retirement age (typically, age 65), the participant's benefit must be actuarially adjusted to reflect the delay in payment unless the plan suspends benefit payments in accordance with the applicable provisions of ERISA and the tax code. The requirement to provide an actuarial adjustment does not apply to a participant who has not yet attained normal retirement age. *See* 29 U.S.C. § 1053(a)(3)(B); 26 U.S.C. § 411(a)(3)(B); 29 C.F.R. § 2530.203-3 (2003); Rev. Rul. 81-140, 1981-1 C.B. 180.

tax code also allows employers to favor older workers with benefits not available to younger workers. For example, Section 401(k) — which allows employees to make tax-free contributions from their salary into a defined contribution plan — permits enhanced benefits for workers over age 59½. In order to qualify for favorable tax treatment, Section 401(k) generally provides that a plan must restrict most distributions until certain events (such as termination of employment, hardship, death, or disability) occur. *See* 26 U.S.C. § 401(k)(2)(B)(i). For employees over age 59½, however, the tax code allows a 401(k) plan to make special in-service distributions. *See* 26 U.S.C. § 401(k)(2)(B)(i)(III).

"Catch-up contributions" are another example of a discretionary, age-based benefit. The tax code currently provides that a participant in a Section 401(k) plan may not contribute more than a specified dollar amount to the plan. *See* 26 U.S.C. §§ 401(a)(30), 402(g). In 2003, for example, the law caps these elective deferral contributions at $12,000. *See* 26 U.S.C. § 402(g). This limitation prevents employees from deferring income tax on more than the specified sum. In 2001, however, Congress amended the tax code to allow participants who are at least age 50 to make "catch-up contributions" in excess of the otherwise applicable limits. *See* 26 U.S.C. §§ 414(v), 402(g)(1)(C). In 2003, employees age 50 and over may contribute an additional $2,000, and in subsequent years, even more. *See* 26 U.S.C. § 414(v)(2)(B) (limit increases by $1,000 each year after 2003 until 2006). Although a plan is not required to offer participants the opportunity to make such catch-up contributions, if it does, only participants age 50 or older may make them. *See* 66 Fed. Reg. 53,555, 53,556 (Oct. 23, 2001).

The tax code also allows defined benefit pension plans to pay employees higher pensions based solely on the worker's older age. Currently, the tax code sets limits on the annual benefit that can be paid to a participant from a qualified defined benefit pension plan: when converted to a life annuity, this annual benefit cannot exceed $160,000. 26 U.S.C. § 415(b). The tax code provides, however, that this $160,000 maximum is adjusted downward if the participant commences benefits prior to age 62, or adjusted upward if the participant commences benefits after 65. 26 U.S.C. §§ 415(b)(2)(C), 415(b)(2)(D). The limit is established at the equivalent of an annual benefit commencing at age 62 or 65, respectively. In other words, an employee who retires at age 55 and begins receiving a pension is subject to an annual benefit limit that is considerably lower than $160,000. Conversely, an older employee retiring at age 70 is eligible to receive substantially more than the $160,000 cap. The rationale behind this rule is that a worker who retires and begins receiving his pension at, for example, age 70 instead of age 65, will have fewer years in which to receive the annuity, and therefore, the maximum benefit that he is allowed to be paid each year should be increased.

Previous vesting rules instituted by ERISA also allowed employers to provide special benefits to older workers. Prior to 1986, ERISA and the tax code allowed a pension plan to provide for vesting under the "Rule of 45." Under this rule, a participant would become 50% vested in his benefit when his years of service equaled or exceeded five, and the sum of his age and years of service equaled 45. *See* 26 U.S.C. § 411(a)(2)(C)(i), *repealed by* Pub. L. No. 99-514 § 1113; 29 U.S.C. § 1053(a)(2)(C)(i), *repealed by* Pub. L. No. 99-514 § 1113. The participant would vest an additional 10% for each year of service thereafter. This age-

weighted vesting schedule was specifically intended to provide protection for the older worker who was closer to retirement and who may not have another chance to earn a pension if he left his employer before retirement. *See* H.R. Rep. No. 93-807, at 55 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4721 ("[T]he rule of 45 should be available as an alternative for those plans which would prefer to take an *age-weighted approach*.") (emphasis added). Although Congress ultimately repealed the Rule of 45 for reasons unrelated to age discrimination concerns,[5] the existence of the Rule of 45 for over a decade reflects Congress's understanding that employers may accommodate the needs of older workers through their benefit plans without extending the same treatment to all those age 40 and over.

The spectrum of age milestones that Congress has provided in ERISA and the tax code is neither random nor arbitrary. Under these statutes, Congress has not labeled every employee age 40 and over as an "older worker" who is entitled to the full range of pension and welfare benefits. Rather, these statutes recognize that workers have different needs as they age. For example, in Congress's estimation, only employees who retire at or after age 65 need to begin receiving retirement income immediately. *See* 26 U.S.C. § 401(a)(14). In contrast, employees nearing retirement age — age 55 and over in Congress's view — need greater options for retirement investing because of the fluctuations in the value of employer stock during the years prior to the

[5] *See* H.R. Rep. No. 99-313, at 589-90 (1986) (Rule of 45 eliminated as part of revision to all permissible vesting schedules in order to ensure participants vest more quickly than after completing 10-15 years of service).

employee's expected retirement date. *See* 26 U.S.C. § 401(a)(28). *Compare* H.R. Rep. No. 93-807, at 70 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4735 (provision requiring pension benefits to begin at age 65 intended "[t]o ensure that a participant can reasonably expect to receive his benefits *during* his retirement years") *with* H.R. Rep. No. 99-426, at 788 (1985) (ESOP diversification requirement intended to protect "plan participants *approaching* retirement age") (emphases added).

II. CONGRESS DID NOT INTEND THE ADEA TO PROHIBIT THE TYPE OF PRACTICE THAT IT HAS EXPRESSLY ENDORSED IN ERISA AND THE TAX CODE.

A. The ADEA Should Be Read In Harmony With The Approach Taken in ERISA And The Tax Code, Not Placed In Conflict With It.

The notion that the ADEA prohibits what ERISA and the tax code either require or permit is contrary both to common sense and to the courts' responsibility to interpret statutes harmoniously. *See J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A holding that the ADEA bars an employer from favoring older workers in benefit programs would either negate or effectively rewrite those provisions of ERISA and the tax code that use age-based distinctions. For example, under the theory of the decision below, employers presumably would have to provide diversification rights to ESOP participants age 40 and up, even though the tax code plainly permits this

opportunity to be provided only to workers age 55 and older. *See* 26 U.S.C. § 401(a)(28).

Similarly, no employer could take advantage of the opportunities that ERISA and the tax code provide to assist older employees because these statutes do not permit employers to extend the benefit to all workers at age 40. For example, the opportunity that the tax code provides for plans to offer "catch-up contributions" would be hollow because catch-up contributions may be offered only to employees age 50 or older. *See* 26 U.S.C. § 414(v). A reading of the ADEA that prohibits more favorable treatment for workers when they reach age 50, 55, 59½, 65, or 70½ conflicts with the policy judgment that Congress made in ERISA and the tax code to provide enhanced benefits to workers along an age continuum.

Nothing in the text or history of the ADEA compels the conclusion that Congress intended to put the age-discrimination statute in tension with those provisions of ERISA and the tax code that permit or require distinctions based on ages over 40. In the case below, the concurring opinion posited that Congress must have intended to require equal treatment in benefit programs for all workers in the protected class because Section 4(l) of the ADEA explicitly permits employers to condition eligibility for retirement benefits on the attainment of a minimum age. *See Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 473 (6th Cir. 2002) (Cole, J., concurring); 29 U.S.C. § 623(l)(1)(A). According to the concurrence, "[i]f younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in § 623(l)(1)(A) would not be necessary (because only younger employees could sue based on a minimum

retirement age)." *See Cline*, 296 F.3d at 473 (Cole, J., concurring) (parenthetical in original).

The legislative history of this provision plainly contradicts the concurring opinion's conclusion. Congress included this section not to obliquely recognize reverse discrimination claims, but merely to provide an example of conduct permitted by the ADEA: "[This] exception is included merely for clarification. No court or agency has ever concluded that the existence of a minimum age for retirement would constitute a violation of the Act." H.R. Rep. No. 101-664, at 59 (1990). The legislative history thus makes clear that Section 4(l) was not, as the concurrence surmised, creating an exception to the rule, but was simply *restating* the rule that it does not constitute a violation of the ADEA to provide certain benefits only to older workers in the protected class.

Other sections of the ADEA also reflect the congressional understanding that an employer need not offer benefits on comparable terms to all those age 40 and over. For example, retiree health benefits are defined, in part, as "benefits provided pursuant to a group health plan covering retirees, for which . . . the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII [*i.e.*, Medicare] . . . ." 29 U.S.C. § 623(l)(2)(D)(ii). If Congress intended the ADEA to prohibit age thresholds once a worker reached age 40, it would not have used a definition of retiree health coverage that turns only on the benefits available to those 65 and older.

The Sixth Circuit's attempt to reconcile its holding with this Court's precedents illustrates the absurd practical consequences of a "reverse" discrimination interpretation of the ADEA. In addressing the tension between reverse discrimination claims and this Court's holding in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996), the concurrence observed that a plaintiff could make out a prima facie case of reverse discrimination by showing that he had been disadvantaged in favor of someone with a "substantial difference in age" rather than a "substantially younger" counterpart, as prescribed in *O'Connor*. *See Cline*, 296 F.3d at 475 (Cole, J., concurring). Applying the "substantial difference in age" test, however, reinforces that Congress could not have intended to allow reverse discrimination claims under the ADEA. Under a "substantial difference in age" test, the younger the worker, the more easily he could make out his prima facie case. As an example, a plan administrator might grant a 65-year-old employee a discretionary benefit, but deny that benefit to 60-year-old and 40-year-old fellow employees. Under the "substantial difference in age" reformulation suggested by the concurring opinion below, the 40-year-old employee could more easily satisfy the prima facie case than could the 60 year old. That a younger employee more easily secures protection under an *age* discrimination law defies common sense and turns the ADEA on its head.

In sum, nothing in the ADEA indicates that it should not be read in harmony with ERISA and the tax code to permit age-based distinctions that make certain benefits available to workers as they age. To the contrary, the difficulties that would arise in reconciling the statutes weigh decisively against the Sixth Circuit's interpretation of the ADEA. Would the ADEA preempt those provisions of

ERISA or the tax code that require differential age treatment, or vice versa? Would the "minimum ages" of ERISA and the tax code be effectively rewritten to correspond with the ADEA protected class, so that the minimum age was always 40? Would an employer still be allowed to take advantage of an ERISA or tax provision permitting differential age treatment, or could the exercise of such an option still be discriminatory? The complexities in reconciling the different statutory regimes illustrate the folly of interpreting the ADEA to prohibit the type of age-based distinctions that Congress has expressly authorized and endorsed elsewhere.

B. A "Reverse" Discrimination Interpretation Of The ADEA Undermines The Statute's Purpose By Jeopardizing Employee Benefit Programs That Are Advantageous To Older Workers.

By calling into question any practice that advantages an older employee, the decision below threatens benefits enjoyed by countless workers, especially the older workers whom Congress sought to protect under the ADEA. Many employers have plans that make the age distinctions that have been required or permitted by Congress, as described in Part I, *supra*. But a number of plans provide advantageous benefits to older workers even without an express congressional instruction that they must or may do so once the employee reaches a certain age. Thus, even if the age differentiations found in ERISA and the tax code were found to be undisturbed by the ADEA, there would still be a number of benefit programs whose design would be called into question if the Court were to adopt an interpretation of the ADEA that precluded offering more generous benefits to

older workers except where expressly authorized by Congress.

Many commonly accepted pension plan designs favor older workers even though no specific age or age range has been set by Congress. For example, three types of pension plans favor older workers in the way that benefits accrue: target benefit pension plans, age-weighted defined contribution plans, and fractional accrual defined benefit plans. The tax code recognizes or encourages these age-based plan designs but leaves employers with the discretion to specify the age markers.[6]

A target benefit plan is a defined contribution plan that sets a "target" benefit for each employee. Both Congress and the United States Department of the Treasury have sanctioned or encouraged these benefit plans. *See* 26 U.S.C. § 411(b)(2)(B); 29 U.S.C. § 1054(b)(2)(C); 26 C.F.R. §§ 1.401(a)(4)-4(b)(3), 1.401(a)(4)-8(b)(1)(v) (2003) (Internal Revenue Service will not challenge plans as violating certain non-age-related discrimination rules in tax code). To reach the target upon the employee's retirement, the employer contributes a designated amount to the employee's account. *See* H.R. Conf. Rep. No. 93-1280, at 344 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5060. Because contributions for older employees have less time to grow and compound, the employer must make larger contributions each year for older workers than it does for

[6] While the ADEA expressly recognizes that it is not discriminatory for an employer to establish a minimum age of eligibility for normal or early retirement benefits, *see* 29 U.S.C. § 623(l)(1)(A), it is silent on other age-based features that may benefit older workers, such as the rate of benefit accrual.

their younger counterparts in order to hit the prescribed targets.

Age-weighted defined contribution plans also benefit older workers. Under these plans, employers contribute more to a worker's retirement as that worker's age, or combination of age and service, increases. For example, such a plan might provide for a contribution on behalf of all eligible employees of 2% of salary if the employee is under age 45, and 3% of salary if the employee is over age 45. These plans have long been accepted as legal, including by the Department of the Treasury, and their designs are subject to extensive regulation. *See* 26 C.F.R. §§ 1.401(a)(4)-8(b)(1)(iv), 1.401(a)(4)-8(b)(1)(viii) (Example (3)) (2003) (permitting plan design that "provides that allocation rates for all employees are determined using a single schedule based solely on age").

Last, fractional accrual defined benefit plans also operate to the advantage of older workers. As with age-weighted defined contribution plans, fractional accrual plans have been expressly approved by the Department of the Treasury. *See* 26 C.F.R. § 1.411(b)-1(b)(3)(iii) (Example (1)) (2003). In a fractional accrual plan, a worker who retires at normal retirement age receives a percentage, *e.g.*, 30%, of his final average compensation during each year of retirement. A participant who terminates employment prior to normal retirement age, however, receives only a "fraction" of the benefit he would have earned had he worked until normal retirement age; this fraction is based on the number of years the participant would have had to work to reach normal retirement age. Therefore, a worker who begins to participate in the plan at an older age (for example, age 60) accrues a larger benefit each year than a worker who begins

to participate in the plan at a younger age (for example, age 45) because the older worker enters the plan when he is closer to the plan's normal retirement age.

Retiree health insurance programs are probably the most widespread example of employee benefit plans that commonly differentiate in favor of older workers. A number of provisions of the tax code encourage employers to provide retiree health and life insurance coverage;[7] however, these provisions do not specify the age at which a separated employee becomes a "retiree" eligible for those benefits. Most large private employers make retiree health benefits available only to workers who reach some age milestone above 40. *See, e.g.*, Paul Fronstein & Dallas Salisbury, *Retiree Health Benefits: Savings Needed to Fund Health Care in Retirement*, Employee Benefit Research Institute, Issue Brief No. 254, 9 (Feb. 2003), *available at* http://www.ebri.org/pdfs/0203ib.pdf (hereinafter "EBRI Brief").

In 2002, 64% of employers with 1,000 or more employees provided retiree health coverage only to employees age 50 or older who met some length of service requirement. *Id.* In 2002, the most common age threshold for retiree health benefits was age 55: 58% of large

[7] *See, e.g.*, 26 U.S.C. § 401(h) (pension plans may provide payment of benefits for medical expenses of retired employees and their spouses and dependents); 26 U.S.C. § 420 (excess assets in pension plan trust may be transferred to account to pay current retiree health liabilities); 26 U.S.C. § 419A(c)(2) (plans may reserve additional funds under qualified asset account to pay post-retirement medical and life insurance benefits). *Cf.* 26 U.S.C. § 132(h)(1) (employer may provide retirees with tax-free fringe benefits such as no-additional-cost service and qualified employee discounts).

employers last year conditioned eligibility for retiree health benefits on the employee reaching age 55 and satisfying a years of service requirement. *Id.* Indeed, minimum age requirements are essentially universal in retiree health plans. According to a nationwide survey of 435 large companies, less than 1% of large employers offering pre-65 retiree health coverage and 3% of employers providing retiree health coverage for those 65 and older based eligibility on years of service alone in 2002. *The Current State of Retiree Health Benefits: Findings From the Kaiser/Hewitt 2002 Retiree Health Survey*, 2, 4 (Dec. 2002), *available at* http://www.kff.org/content/2002/20021205a/6061v4.pdf (hereinafter "Kaiser/Hewitt Retiree Health Survey").

By calling into question any age distinction that benefits older workers relative to their younger counterparts in the ADEA's protected class, the interpretation of the ADEA set forth in the decision below is a major threat to an employer's decision to provide retiree health coverage. In recent years, the costs of retiree health coverage have grown dramatically. Between 2001 and 2002 alone, the cost of retiree health benefits increased by an estimated 16% on average among large employers in a recent survey. *Kaiser/Hewitt Retiree Health Survey*, at 10. Many employers have responded to these cost increases by eliminating retiree health coverage altogether. Over the last decade, the level of retiree health benefit coverage has declined steadily. *Id.* at v. While an estimated 60-70% of large employers provided retiree health benefits during the 1980's, fewer than 40% offered such coverage by 1998. *Private Health Insurance: Declining Employer Coverage May Affect Access for 55-to 64-Year-Olds*, General Accounting Office, HEHS-98-133 at 7 (June 1998), *available at* http://www.gao.gov. According to the United

States Department of Health and Human Services, in 2000 only 12% of all private establishments offered health benefits to workers retiring before age 65, and only 10.7% offered coverage to Medicare-eligible retirees. *Percent of private sector establishments that offer health insurance by plan options and insurance offerings to retirees by State: United States, 2000*, Medical Expenditure Panel Survey, Agency for Healthcare Research & Quality, United States Department of Health & Human Services, *available at* http://www.meps.ahrq.gov/MEPSDATA/ic/2000/Tables_II/TIIA2e.pdf.

In light of rising costs, many employers might be forced to reduce or discontinue retiree health benefits altogether if faced with a mandate to expand these benefits to every worker age 40 and over. Furthermore, those employers who today would seek to preserve benefits for the oldest members of their workforce by increasing age eligibility requirements, *see EBRI Brief*, at 8, would no longer have this option available. These employers too would likely be forced to take the more drastic step of eliminating their retiree health benefit programs in their entirety.

Ultimately, the interpretation of the ADEA adopted by the decision below is likely to work to the detriment of older workers. Instead of having more secure pension and welfare benefits, older workers could lose many of the advantageous benefits that they now enjoy. That surely was not the intent of Congress in 1967 when it enacted the ADEA or in 1990 when it extended the ADEA to cover employee benefit programs. In ERISA and the tax code, Congress itself has repeatedly and explicitly required or permitted employers to provide more generous benefit

treatment to workers who have attained certain age milestones over age 40. The ADEA should be construed consistently with those statutes, and the Sixth Circuit's contrary interpretation should be reversed.

CONCLUSION

For all of these reasons, as well as those set forth in the brief for Petitioner, *amicus* respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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